IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.560 OF 2001

1. Twin Star Venus Co-op. Housing)
Society Ltd. Venus Apartments,)
87, Cuffe Parade, Mumbai 400 005.)

2. Pravinchandra H. Nanavati)
Secretary of the Petitioner No.1)
Society, Venus Apartment, 87,)
Cuffe Parade, Mumbai 400 005.)..Petitioners

Versus

1. G.N.Sainani)
Indian Inhabitant, Member of)
Petitioner no.1 Society, presently)
residing at B, 5/34 MIG, Gandhi)
Nagar, Bandra (E), Mumbai 400 051.)

2. The Deputy Registrar,)

Cooperative Societies Mumbai (A-Ward))
Malhotra House, 6th floor, Opp.GPO)
Fort, Mumbai 400 001.)

3. The Divisiional Joint Registrar)
C.S. M.d. (Appeals), Malhotra House)
6th floor, Opp. G.P.O. Mumbai 400 001)

4. State of Maharashtra)
(Service) through the Govt. Pleader)
High Court, (O.S.), Mumbai.)..Respondents

Mr.M.M.Bagadia for Petitioner.
Mr.N.K.Mudnaney with Ms R.V.Bagve for Respondent No.1
Mr. Milind More, AGP for Respondent No.2

CORAM : P.V.KAKADE, J.
DATE : 5TH DECEMBER, 2005

ORAL JUDGMENT :

1. Heard the learned counsel for the Petitioners as well as for the Respondents.

2. This Petition filed Under Article 226 of Constitution of India by the Petitioners impugning the directions issued by Respondent no.4 dated 9.3.1995 by way of Circular submitting that it is ultra vires, illegal and contrary to law and consequently sought quashing and setting aside the impugned Order dated 21.7.2000 passed by the Respondents with regard to the activities of the concerned parties.

3. The Petitioner No.1 is a Society, duly registered under the Maharashtra Cooperative Societies Act, 1960. The Petitioner No.2 is the Secretary of the Petitioner No.1 Society. The Respondent Nos.2 and 3 are Officers appointed by Respondent no.4 under the said Act. The Respondent No.1 is the member of Petitioner No.1 Society. The Petitioners have submitted that the Circular issued on 9.3.1995 passed by Respondent No.4 is purported to exercise the powers vested under Section 79-A of the Maharashtra Cooperative Societies Act, 1960 (hereinafter referred to as "the said Act") and the consequential order passed by the Respondent Nos.2 and 3 under Section 97 of the said Act. The impugned Order /Circular dated 9.3.1995, according to the Petitioner, is ex-facie, ultra vires, discriminatory, arbitrary and

unreasonable and therefore, has to be struck down.

. In this regard it must be noted that at the time of admission of this Petition, along with other similar Petitions, order was passed to the effect that the liberty was given to apply soon after the Government of Maharashtra took decision on the Circular dated 9.3.1995. This order came to be passed in view of the fact that at the time of admission of this petition, it was submitted on behalf of the State that the process of reconsideration of Circular dated 9.3.1995 was in effect and therefore, liberty was given to apply after the decision was taken. Now as the situation stands today, the State Government has in fact reconsidered the earlier impugned Circular dated 9.3.1995 substituting it by new Circular dated 1.8.2001 issuing directions to the effect that the earlier Circular dated 9.3.1995 was cancelled from the date of issuance of new Circular i.e. 1.8.2001. It was also directed that Non-occupancy charges would be assessed not more than 10% of the service charges by the Society excluding the Municipal Charges. It was further directed that no non-occupancy charges would be levied on the members if the tenements are occupied by the relatives mentioned in the said

Circular. This Circular was made applicable to all residential and commercial Cooperative Societies. Therefore, it is needless to mention that the entire scenario has changed since the time when the Petition was filed and hence the Petition is finally being heard on merits.

4. On this background, it would be worthwhile to look into the allegations made by the Petitioners against the respondents. It is the case sought to be made on behalf of the Petitioners that the Respondent No.1 is a Member of Petitioner No.1 Society and allotted Flat No.181 in building belonging to Petitioner No.1 Society. As per the bye-laws of the Society the object of the Society inter alia, is to manage, administer and maintain its building in accordance with the Cooperative principles and enforce obligation of the members of the Society, inter se; bye-laws of the Society. It also provides that the Society shall collect from members by way of monthly, quarterly or other periodical or ad hoc sums as may be decided from time to time by the Managing Committee to be used for meeting the charges and expenses for maintenance and the upkeep of the building. Although it was obligatory on the part of the members to

occupy their respective flats, bye-laws No.45 of the Society provides that a member with the previous permission in writing of the Managing Committee can give a flat on Leave and Licence basis or Caretaker basis subject to the conditions set out therein and subject to the payments of non-occupancy charges to the Society at such rate as is decided by the general body from time to time. On 29.9.1997 Respondent Oo.1 addressed a letter to the Society seeking permission to give his flat to ANZ Grindlays Bank on leave and licence basis and agreed and undertook to pay the non-occupancy charges at the rate fixed by the Society during the period mentioned in the said agreement. The said permission was granted by the Society by its letter dated 1.10.1997 subject to the terms set out therein and on payment of non-occupancy charges at the rate of 7500/= per month. However, inpsite of the said undertaking to give along with charges, the Respondent No.1 failed and neglected to pay the non-occupancy charges and by a letter dated 12.5.1998 the Respondent No.1 purported to contend that the levy of non-occupancy charges in contravention of the Government Circular and the same cannot be collected from the Respondent No.1.

. This is the bone contention between the parties. By letter dated 12.3.2000 the Society called upon the Respondent No.1 to pay outstanding arrears of non-occupancy charges amounting to Rs.4,92,741/= and also called upon the Respondent No.1 to give interest free deposit of Rs.5 Lakhs. The Respondent No.1, in his turn, informed the Society that he had paid under protest the outstanding non-occupancy charges and also given interest free deposit of Rs.5 lakhs and sought permission of the Society to give flat on leave and licence basis.

. On 2.6.2000 the Petitioner No.1 received a letter dated 9.2.2000 purported to have been issued by the Respondent No.2 stating therein that a complaint has been filed by the Respondent No.1 regarding the non-occupancy charges in excess of the amount permitted under the Government Circular dated 9.3.1995. It was stated that the hearing of the complaint was fixed on 11.2.2000. The Petitioner No.1 by its letter dated 18.6.2000 informed the Respondent No.2 that the aforesaid letter was received on 2.6.2000 and pointed out that the State Government had confirmed in several Writ Petitions that the said Circular will not be

implemented and accordingly the Respondent no.2 was called upon not to take any steps pursuant to the said Circular dated 9.3.1995. However, inspite of this aspect, the Dy. Registrar Cooperative Societies proceeded with hearing of the matter in absence of the Petitioners and came to the conclusion that the Circular dated 9.3.1995 would prevail and passed order accordingly. The appeal was preferred against the said order before the Joint Registrar, who refused to Stay the order pending the appeal. The Joint Registrar confirmed the order passed by Dy. Registrar holding that the Circular dated 9.3.1995 issued by the Government under Section 79A of the said Act would prevail and dismissed the appeal. Hence the Petition came to be filed.

5. I have perused the affidavit in reply as well as the compilation filed by the parties.

. The learned counsel for the Petitioners submitted that the orders passed by the concerned authorities dated 21.7.2000 and 30.12.2000 were illegal and liable to be struck down. It was also contended that the Circular dated 9.3.1995 was also arbitrary,

illegal and unreasonable and therefore, could not be acted upon and thus the order passed on the basis of impugned Circular is bad in law. The force of the Circular is also challenged on the ground that it is illegal and discriminatory.

6. In the impugned Circular dated 9.3.1995 it was stipulated that non-occupancy charges should not be more than one time of the service charges and if a member had given his tenement to family members mentioned in the Circular no non-occupancy charges would be charged. In other words, it is the case of the Respondent No.1 that he is not liable to pay non-occupancy charges more than one time of service charges and therefore, the demand made by the Petitioners consequent its resolution was illegal. In this regard, it must be noted that the view taken by the Dy. Registrar as well as Joint Registrar is to the effect that the Society cannot take stands contrary to the Government Circular dated 9.3.1995 issued by the Government under Section 79-A of the said Act. The learned counsel for the Respondent No.1 in this regard sought to put reliance on the order passed by the Single Judge of this Court in the case of **Matru Ashish Co-op. Housing Society Ltd. vs. Bhavana**

Maternity Home and Ors. reported in 2004 (2) Bom. C.R. 864 wherein it was categorically held that even though there was contract to pay higher charges, it would not entitle the Society to claim amounts contrary to the directions issued by the competent authority. In other words, it was held that the statutory restrictions or directions imposed by the State will have to be followed by the Cooperative Societies under Section 79A of the Act. It is to be noted that the judgment in **Matru Ashish (supra)** was appealed against, however, the Division Bench of this Court concurred with the findings recorded by the learned Single Judge and dismissed the appeal with observation that the Society would not be allowed to claim non-occupancy charges from its members contrary to the directions issued by the competent authority. The Special Leave Petition was preferred against the judgment of the Division Bench also dismissed by the Apex Court. In view of this position, I do not have any doubt whatsoever that the ratio laid down by this Court in the case of **Matru Ashish (supra)** has to prevail in order to hold that the Society cannot claim amount contrary to the directions issued by the competent authority. The learned counsel for the Petitioners submitted that the facts involved in the

case of Matru Ashish were totally different and therefore, the ratio laid down in the said order cannot be applicable to the present case. I prefer to disagree with this submission and hold that the ratio of the said order is to the effect that the Society is bound by the directions issued by the competent authority's Circular under Section 79 of the said Act and therefore, the Society has no escape from such directions.

7. In this matter the situation has changed in view of the position that the State Government has reconsidered the earlier Circular and has issued fresh Circular as noted above dated 1.8.2001 directing that non-occupancy charges would not be more than 10% of the service charges to be assessed by the Society and therefore, in my consider view, subsequent Circular helds fit at the time of final adjudication of this matter. The Rule issued therein has to prevail to govern the dispute. The learned counsel for the petitioners submitted that the State Government thought it fit to issue subsequent Circular withdrawing earlier Circular itself shows that the earlier Circular was illegal and ultra vires. In my considered view, we cannot jump to any such conclusion only because the

State Government has thought it fit to review its earlier decision and in the interest of cooperative societies and in general reviewed the decision and issued subsequent Circular. In this regard the learned counsel for the Petitioners sought to put reliance on the ruling of the Apex Court in the case of **The State of Maharashtra & Ors. vs. Karvanagar Sahakari Griha Rachana Sanstha Maryadit & Ors. reported in JT 2000 (8) SC 68** in order to buttress his argument that the directions issued by the State under Section 79-A cannot be held to be illegal when those are found to be detrimental to the public or members of the society. The Apex Court has observed that the directions in public interest cannot be issued so as to prejudicial to the interest of the society. What is in the interest of the society is primarily for the society alone to decide and not for an outside agency to say. Directions by Registrar or State Government ought to satisfy the requirement of the interest of the society. In my consider view, there cannot be two opinions with regard to the ratio laid down by the Apex Court. However, perusal of the entire judgment reflects totally different set of facts, wherein issue of commercialisation of Society property was involved when

there was specific provision not to make use of the flat for any commercial purpose, and therefore, it was held that interest of the Society was required to be considered as paramount against the directions issued by the State allowing commercial use of the flats which were earlier purely residential. In these circumstances, I hold that the ratio laid down by the Supreme Court in the said case is not applicable to the preset set of facts. This is especially so, when it is quite apparent that the exorbitant non-occupancy charges are seen to be assessed on Respondent No.1 by the Petitioner Society, and those are clearly contrary to the directions issued by the State Government under Section 79A of the said Act by virtue of Circular dated 9.3.1995.

8. The learned counsel for the Petitioners also sought to submit that the enquiry held by the Dy. Registrar was in their absence and in fact notice of the date of hearing was served upon them after the order came to be passed. However, that aspect was also raised in the appeal before the Joint Registrar as can be seen from the record and the Joint Registrar has taken that aspect into account and dismissed the appeal.

9. For the reasons recorded above, the Circular dated 9.3.1995 cannotbe held to be illegal and therefore, no interference is called for under Writ Jurisdiction of this Court with regard to the said Circular dated 9.3.1995 which is already withdrawn by the State Government and substituted by Circular dated 1.8.2001. In the result there is no merit in the Petition and it stands dismissed with no order as to costs. Rule stands discharged.